MK ASSOCIATES SDN BHD

v.

TETUAN GANESAN K & MUHAMMAD ASHRI

HIGH COURT MALAYA, KUALA LUMPUR
ASMABI MOHAMAD JC
[CIVIL SUIT NO: S2-22-67-2004]
1 MAY 2012

LEGAL PROFESSION: *Solicitors - Stakeholders - Conveyancing transaction - Defendant engaged by plaintiff to be its solicitors - Instruction from plaintiff to refund monies held by defendant as stakeholders to purchaser - Whether plaintiff can recover monies from defendant - Whether plaintiff discharged its burden to prove case - Whether plaintiff's action time barred - Limitation Act 1953, s. 6*

EVIDENCE: *Burden of proof - Balance of probabilities - Whether plaintiff discharged burden to prove case - Whether action time barred - Whether plaintiff estopped from pursuing claim - Evidence Act 1950, ss. 101, 102 & 106*

The defendant was engaged by the plaintiff, a wholly-owned subsidiary of Sateras Group of Companies ('Sateras'), to be its solicitor in a sale and purchase agreement ('SPA') which concerned a piece of land ('the land') owned by the plaintiff. In the instant action, the plaintiff sued the defendant to recover RM3.3 million which it claimed was the balance of the total balance purchase price of RM4 million ('the balance sum') the defendant had received, as stakeholders, from the purchasers under the SPA. The plaintiff claimed the RM3.3 million was due and payable to it under the SPA. The defendant acknowledged that it received the balance sum but its release to the plaintiff was dependent on the plaintiff's fulfillment of two pre-conditions under the SPA which the plaintiff failed to satisfy. The pre-conditions were, (i) the procurement of a duly executed Form 17A under the National Land Code ('NLC') relating to an easement over a property adjoining the land; and (ii) the authority's approval of an amendment to the lay-out plan. The defendant contended that owing to the plaintiff's failure to fulfill the pre-conditions, the parties re-negotiated and agreed to enter into a joint venture to develop the land. Pursuant to that re-negotiation, the defendant contended that it was instructed by the plaintiff to return the

balance sum to the purchaser for it to be treated as the plaintiff's investment in the joint venture project. When the project was later abandoned, the plaintiff demanded for payment of the balance sum from the purchaser which only settled a portion of it. The defendant contended that since the refund to the purchaser of the balance sum was done on the plaintiff's instruction, the plaintiff was estopped from making the instant claim. The defendant also argued that the claim was time barred under s. 6 of the Limitation Act 1953.

Held (dismissing plaintiff's claim with costs):

(1) There was sufficient evidence to show that the plaintiff had not fulfilled the two pre-conditions, *ie*, the procurement of a duly executed Form 17A NLC for the grant of an easement and the approval of the amended lay-out plan to enable the defendant to release the balance sum to the plaintiff. Despite having pleaded that it had fulfilled those two pre-conditions, the plaintiff failed to discharge the burden to prove its pleaded case on this issue. (para 63)

(2) The defendant was able to demonstrate that the balance sum was properly returned to the purchaser. The testimonies of the defendant's witnesses were supported by contemporaneous documentary evidence and the plaintiff had not challenged their evidence. The plaintiff had failed to establish its pleaded case that the balance sum was still held by the defendant. (para 70)

(3) The minutes of Sateras showed that the plaintiff was negotiating with the purchaser for the repayment of its investment in the joint-venture project. This showed that the plaintiff was fully aware that the balance sum received by the defendant had been returned to the purchaser. (para 72)

(4) Based on the plaintiff's own pleaded case, the plaintiff's cause of action against the defendant accrued on 24 March 1997. As the suit was filed on 16 January 2004, the plaintiff's action was out of time under s. 6 of the Limitation Act 1953. (para 73)

(5) The plaintiff by its own conduct, actions, admissions, omissions and/or from contemporaneous documents was estopped from pursuing with its claim against the defendant. (para 74)

Case(s) referred to:
Johara Bi Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor [1980] 1 LNS 199 FC ***(refd)***
Yue Sang Cheong Sdn Bhd v. PP [1973] 1 LNS 182 FC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 101, 102, 106
Limitation Act 1953, s. 6

For the plaintiff - NS Guok (Simon Hong with him); M/s Guok Leong Hong & Fong
For the defendant - Oh Choong Ghee (Subashini Ramakrishnan with him); M/s Valen, Oh & Partners

Reported by Ashok Kumar

JUDGMENT

Asmabi Mohamad JC:

Introduction

[1] The plaintiff, MK Associates Sdn Berhad (the "plaintiff") had commenced this action, against a firm of solicitors, Messrs Ganesan K & Muhammad Ashri, previously known as Ganesan K & Rakan-Rakan, (the "defendant") claiming for judgment in the sum of RM3.3 million which sum was allegedly held by the defendant as stakeholders in respect of a sale and purchase of a parcel of land owned by the plaintiff.

Documents

[2] At the outset of the trial both parties have agreed for the following documents to be used:

Description			Document
i. Bundle of Pleadings		-	"A"
ii. Common Agreed Bundle of Documents	("A")	-	"B1"
iii. Common Agreed Bundle of Documents	("B")	-	"B2"
iv. Common Agreed Bundle of Documents	("C")	-	"B3"
v. Supp Common Agreed Bundle of Doc	("A")	-	"B4
vi. Supp Common Agreed Bundle of Docts	("B")	-	"B5"
vii. Supp Common Agreed Bundle of Docts	("C")	-	"B6"

A viii. Issues to be tried for Plaintiff - "C"
ix. Issues to be tried for Defendant - "D"
x. Statements of Agreed Facts - "E"
xi. Summary of Case for the Plaintiff - "F"
B xii. Summary of Case for the Defendant - "G"

The Issues To Be Tried

[3] Both parties to the action had filed separate issues to be tried as shown in documents marked as "C" and "D" respectively. C The broad and common issues could be summarized as follows:

(i) Whether the plaintiff had complied with the condition under cl. 4 of the Sale and Purchase Agreement entered into between the plaintiff and LK Oii Development dated 31 March D 1996? If the answer is in the affirmative whether the Plaintiff is entitled to RM3.3 million which was deposited by LK Oii with the defendant as stakeholders?;

(ii) Whether the sum of RM4.0 million which was held by the E defendant as stakeholders had subsequently been released to LK Oii at the request of the plaintiff as the plaintiff's investment in a joint venture agreement entered into by the Plaintiff and the said L.K. Oii;

(iii) Whether the plaintiff can maintain an action for monies paid F pursuant to a Sale and Purchase Agreement which was superseded by a supplemental agreement dated 23 March 1999 entered into between the plaintiff and LK Oii;

(iv) Whether the plaintiff's action is barred by the Limitation Act G 1953;

(v) Whether the plaintiff by its own conduct, action, admission, omission and or from contemporaneous documents is estopped from pursuing with this claim.

H **Background Facts**

[4] The plaintiff, a wholly owned subsidiary of Sateras Group of Companies ("Sateras"), which owned of a piece of land described as HS (D) 2053, PT No.1394, Mukim Serendah, Daerah Ulu I Selangor, Selangor (the "Land") had entered into a sale and

purchase agreement with LK Ooi Development Sdn Bhd (the "purchaser") *vide* an agreement dated 31 March 1996 (the "agreement") to sell the said land to the purchaser at the purchase price of RM9 million. The plaintiff had appointed the defendant to act as their solicitors for the purpose of the agreement whilst the purchaser was represented by Messrs Azhar & Goh.

[5] At the time of the execution of the said agreement the land was charged to Hong Leong Bank Berhad ("HLBB"). The purchaser had obtained financial facility from United Merchant Finance Bhd ("UMFB") to finance the said purchase.

[6] Pursuant to the said agreement, the purchase price of the said Land was to be paid in the following manner:

(i) Prior to the execution of the agreement a sum of RM90,000 to be paid as earnest money;

(ii) Upon the execution of the agreement a deposit paid payment of RM810,000;

(iii) The balance of the purchase price of RM8,100.000 was to be paid as follows:

(a) RM900,000.00 upon the plaintiff obtaining the approval from Foreign Investment Committee ("FIC") and the Consent to Transfer;

(b) RM7.2 million to be paid within four months or a further extended period of two months upon the receipt of the approval from FIC and consent to transfer. Parties had also agreed that the sum stipulated under this paragraph was to be paid as follows:

(i) A sum equivalent to a Redemption Sum, to be paid to HLBB;

(ii) RM450,000 to be retained by purchaser's solicitors as a Retention Sum as real property gains tax in respect of the sale; and

(iii) The balance sum of RM4.0 million to be paid to the plaintiff or the plaintiff's solicitors (the "Balance Sum").

[7] The defendant had caused a letter dated 12 March 1997 to be sent to the purchaser's solicitors enclosing the relevant FIC approval as well as the consent to transfer for the solicitor's attention (pp. 249 - 250 of "B2"). In the same letter the defendant had sought for the release of the redemption sum to HLBB, as chargee and also the balance sum of RM4 million which shall be retained by the defendant as stakeholders pending the forwarding of the amended lay-out plan and a duly executed and registered grant of easement and original issue document of title by the plaintiff.

[8] Based on the undertakings by the defendant pursuant to the letter dated 12 March 1997, the redemption sum was paid to HLBB. *Vide* a letter dated 21 March 1997 a cheque for RM4.0 million was issued by the said purchaser's solicitors Messrs Azhar and Goh payable to the defendant which was duly deposited into the defendant's account on 24 March 1997 (p. 57 of "B1").

[9] The plaintiff alleges that it did not receive the balance sum due to it. Instead the defendants made the following payments:

i. On 16 December 1997 - RM200,000.00;

ii. On 19 December 1997 - RM200,000.00;

iii. On 30 December 1997 - RM100,000.00;

iv. On 2 March 1998 - RM200,000.00; and

v. On 28 October 1998 - RM493,802.71

[10] In respect of the last payment made on 28 October 1998 in the sum of RM493,802.71 the plaintiff alleged that the said sum was inclusive of interest amounting to RM93,802.71 less RM50,000 as legal fees deducted by the defendant.

[11] The plaintiff alleged that the plaintiff had only received a sum of RM700,000 as shown in para. 9 above leaving a sum of RM3.3 million due and to be paid to the plaintiff which is still being retained by the defendant as stakeholders.

[12] The plaintiff then commenced this summons and statement of claim ("SOC") against the defendant seeking for the return of the said sum from the defendant.

[13] In their defence the defendant did not deny that they had been appointed as solicitors acting for the plaintiff for the sale and purchase of the said land and in the course of that they had received the sum of RM4 million from the purchaser's solicitors as stakeholders pending the plaintiff's fulfillment of the terms of the agreement which included the procurement of a duly executed Form 17A under the National Land Code, 1965 ("NLC") in respect of the easement over an adjoining piece of land and the amendment of the lay-out plan.

[14] The defendant alleged that these conditions were not fulfilled by the plaintiff and as there was a delay in the fulfillment of these conditions the plaintiff and the purchaser renegotiated and agreed to go into a joint-venture to develop the said land. Subsequent to that the plaintiff instructed the defendant to release the sum of RM4 million to the purchaser to be treated as the plaintiff's investment in the joint-venture project.

[15] Further the defendant alleged that due to the economic and financial crisis, the parties to the agreement had to abandon the project. The plaintiff then demanded from the purchaser for the payment of the purchase price. In December 1997 the purchaser paid the plaintiff the sum of RM500,000 through the defendant and subsequent to that another sum of RM200,000 was paid by the purchaser directly to the Sateras.

[16] The defendant further alleged that on 23 March 1998 the parties to the agreement had entered into a supplemental agreement where both parties acknowledged that the balance sum of RM3,738,000 pursuant to the agreement remained due and owing from the purchaser. Pursuant to the supplemental agreement the purchase price was varied and increased by RM1 million. The parties to the agreement had mutually agreed that a sum of RM550,000 had already been paid leaving a balance of RM450,000. Hence the final purchase price was agreed at RM3,738,000 (RM3,288,000 + RM450,000) plus interest at 10% per annum on the said sum or any remaining sum unpaid from date of the supplemental agreement till date of realisation.

[17] The defendant said that they had released a sum of RM4 million to the purchaser on the plaintiff's instruction and this sum was to be treated as the plaintiff's investment in the joint-venture project. Therefore the defendant pleaded that the plaintiff was estopped from demanding the said sum of RM3.3 million from the defendant. The defendant had also pleaded that the plaintiff's action herein had been barred by s. 6 of the Limitation Act 1953.

[18] The defendant also plead that the plaintiff's action was tainted by *mala fide*.

The Case For The Plaintiff

[19] The plaintiff called four witnesses, Neoh Chin Wah, the Liquidator ("PW1"), Ku Abdul Rahman bin Ku Sulaiman the Managing Director of Sateras ("PW2"), Arunan s/o Tharumaseelan ("director of the plaintiff") ("PW3") and Margaret d/o Vengadasalam the ex Chief Executive Officer of the plaintiff ("PW4"). PW1 was appointed on 16 August 2010, PW2 became the Managing Director in July 2002 and PW3 join the plaintiff in January 2000 and was appointed a director of the plaintiff on 3 August 2002. PW4 was the chief officer of the plaintiff until January 1999.

[20] PW1 informed the court that the plaintiff had been wound up on 5 December 2005 and the official receiver was appointed to take charge of the affairs of the plaintiff. On 16 August 2010 PW1 was appointed as the liquidator in place of the official receiver. Soon after his appointment PW1 discovered that there was a pending suit against the defendant and sought the consent of the then solicitors to appoint the current solicitors, Messrs Guok Leong Hong & Fong to take over the conduct of this matter.

[21] PW1 did not testify as to the merits of the plaintiff's claim in his examination-in-chief but merely stated what the plaintiff's cause of action against the defendant was, and the various attempts made by the plaintiff's current solicitors to secure the attendance of PW4 in court as a witness for the plaintiff and the reason PW1 was not able to comply with the notice to produce the documents dated 16 August 2011 ("pertaining to Items 1 to 16").

[22] PW2 testified that he was appointed as the Managing Director of Sateras in July 2002 and held the said post until the order dated 5 December 2005 was made by the court for the plaintiff to be wound up and the official receiver was appointed to manage the affairs of the plaintiff. PW2 testified that the plaintiff's claim against the defendant was for the return of the sum of RM3.3 million which was held by the defendant pursuant to the agreement. According to PW2 the balance sum was paid by the purchasers solicitors, Messrs Azhar & Goh to the

defendant as stakeholders. Soon after PW2 became the Managing Director of Sateras, PW2 had made inquiries from one Ganesan, the defendant's senior partner pertaining to the said sum and was told by Ganesan that the purchaser had never paid the Balance Sum to the defendant as stakeholders. Ganesan had also told PW2 that he had managed to secure a judgment against the purchaser and its director for the outstanding sum owed to the plaintiff (Q7 of WSPW2). A B

[23] PW2 then inquired from one Mr Goh Thian How, a senior partner of Messrs Azhar & Goh, who was the purchaser's solicitors about the balance sum and was informed that the said sum had already been paid to the plaintiff's solicitor as Stakeholders. Realizing that Ganesan was not truthful and had breached his duty as the plaintiff's solicitor, PW2 then instructed Messrs S. Murthy & Associates to issue a notice of demand and followed by this action to recover the Balance Sum of RM3.3 million from the defendant plus interest (Q7 of WSPW2). C D

[24] PW3 joined the plaintiff in 2000 as a finance manager and on 3 August 2002, PW3 was appointed as the director of the plaintiff. PW3 testified that the plaintiff herein had commenced this action against the defendant to recover the balance sum (plus interest), interest for late payment of RM700,000 interest for late payment of RM543,802.71 and costs. According to PW3 the claim against the defendant was essentially for monies which the defendant received as stakeholders but failed to forward to the plaintiff as vendor (Q4 of WSPW3). E F

[25] Pursuant to the agreement the total price for the purchase of the land was RM9 million. The purchaser should pay a sum of RM90,000 to the vendor prior to the execution of the agreement and a sum of RM810,000 was to be paid by the purchaser upon the execution of the agreement ("clause 3.1 agreement at p. 6, 2 to 51 of "B1"). The agreement shall be subject to the vendor fulfilling the conditions stipulated in cl. 4 of the agreement within six months from 26 July 1996, which was by 25 January 1997, with a further extended period of another three months, failing which the purchaser would be entitled to a refund of the deposit. The conditions were: G H

(i) The plaintiff to obtain FIC approval for the sale of the said land; I

(ii) The plaintiff to obtain the consent from the relevant authority to transfer; and

(iii) The plaintiff to obtain the approval for the amendment of that part of the layout plan which was at the material time approved as "Institusi (Sekolah Swasta)" to "Kemajuan Akan Datang ("Perumahan").

[26] Once the abovementioned conditions had been satisfied by the plaintiff, the purchaser would pay the balance purchase price amounting to RM8.1 million in two tranches as follows:

(i) RM900,000 being the 1st Tranche was to be paid to the plaintiff within 14 days from the receipt of the notification from the defendant by the purchaser of the fulfillment of the conditions precedent pertaining to the FIC approval and the consent to transfer;

(ii) Upon the payment of the 1st Tranche of RM900,000, the 2nd Tranche RM7.2 million should be paid by the purchaser to the plaintiff within four months from the receipt of notification from the defendant by the purchaser of the fulfillment of the conditions precedent (cl. 5.4 (a) of the agreement at p. 8 of document "B1");

(iii) Pursuant to the agreement the 2nd Tranche shall be paid in the following manner:

(a) A sum equal to the redemption sum payable to HLBB, being the chargee;

(b) A sum equal to the retention sum shall be paid to the purchaser's solicitors as stakeholders as envisaged under cl. 12 of the agreement, which sum shall be released to the plaintiff's solicitors upon receipt of the exemption letter from the plaintiff's tax agent or auditors; and

(c) The balance less the sum under item (i) and (ii) above shall be paid to the plaintiff or plaintiff's solicitors.

(iv) Upon issuance of the undertaking by the purchaser's financiers to pay the 2nd Tranche, the purchaser's financier's would be entitled to present the memorandum of transfer for registration in favour of the purchaser (cl. 5.4(c) and 5.5 of the agreement at pp. 8 to 9 of document "B1"); and

(v) Plaintiff was to execute a grant of easement in form 17A of the National Land Code ("NLC") upon the execution of the agreement and shall deposit the same to the defendant as the stakeholders. The fully executed form 17A was to be released to the purchaser's solicitors once the 1st Tranche was paid (cl. 8.3(c) of the agreement at p. 11 of document "B1").

[27] PW3 testified that upon the execution of the agreement the purchaser paid the balance of the deposit and part payment of RM810,000. This sum plus the earnest deposit which was paid earlier proved that the whole of the deposit of RM900,000 had been paid (cl. 3.1 of the agreement at p. 6 of document "B1"). Under the agreement the 1st Tranche of RM900,000 shall be paid subject to the fulfillment of two conditions, the FIC approval and the consent to transfer. By a letter dated 12 March 1997 issued by the defendant to the purchaser's solicitors the defendant had advised the purchaser's solicitors of the fulfillment of the above two conditions (pp. 249 to 250 of "B2"). In the same letter the defendant had requested the purchaser to forward the sum of RM2.75 million to redeem the said land for purposes of transfer.

[28] The plaintiff was also required to execute form 17A of the NLC pursuant to cl. 8.3(c) of the agreement which was complied by the plaintiff (see letters dated 30 July 1996 and 31 July 1996 at pp. 59 to 62 of document "B1"). The defendant had also undertaken to forward the executed and registrable form 17A (see p. 64 of document "B1").

[29] In respect of the 2nd Tranche of RM7.2 million, a sum of RM2.7 million being the redemption sum was to be paid to the chargee, RM450,000 was the retention sum for real property gains tax (cl. 12 of the agreement at p. 12 of "B1") and the balance sum of RM4 million to be paid to the plaintiff.

[30] The plaintiff was entitled to be paid for the sum of RM7.2 million upon fulfillment of all the conditions precedent. A sum of RM2.75 million had been paid by the purchaser's financiers UMF via telegraphic transfer to the account of the chargee (at pp. 53 and 55 of "B1"). On 21 March 1997 a sum of RM4 million was paid by the purchaser's solicitors to the defendant (at p. 57 of "B1") which was received by the defendant on 24 March 1997 (at p. 251 of "B2"). The defendant had not disclosed the fact that the said balance sum had been paid to the plaintiff through

them as stakeholders. It was only somewhere in 2003 the plaintiff discovered that the balance sum had been paid to the plaintiff through the defendant as their solicitors (at p. 202 of "B2").

[31] The issue pertaining to the non-payment of the balance sum was amongst the items discussed in the Sateras Board Meetings dated 15 November 1997, 31 December 1997, 26 January 1998, 27 March 1998, 27 October 1998 and 25 February 1999 respectively (at p. 126 item 7, p. 145 item 7, p. 163 item 7, p. 176 item 7, p. 209 under heading sale of land (HSD) PT1394 and p. 215 of "B2"). From the minutes of meetings it could be seen that attempts were made to recover the monies from the purchaser. Despite the fact that the full purchase price in respect of the agreement had not been paid the said land was registered in the name of the purchaser. The said land was discharged and re-charged by the purchaser for RM15 million. *Vide* a letter issued by PW4 (at p. 492 of "B3") the defendant was asked to explain the reason the said land was transferred to the purchaser on 19 March 1997 despite the fact that the balance sum had not been paid by the purchaser (at p. 90 of "B1"). According to PW3 the transfer of the land was possible as the purchaser had already paid the plaintiff in full.

[32] Although the defendant had all along given the impression to the plaintiff that the balance sum had not been paid by the purchaser to them as stakeholders, PW3 had obtained the confirmation from the purchaser's solicitors that the same had already been fully paid to the defendant as early as 2 March 1997. Despite a few letters having been sent for the defendant to explain the defendant chose to ignore all letters sent to them. The plaintiff then instructed their previous solicitors Messrs Murthy & Associates to demand the sum of RM3.3 million plus interests from the defendant (at pp. 197 & 198 of "B2") and followed by this action against the defendant claiming for the said RM3.3 million.

[33] The plaintiff's last witness was the plaintiff's former Chief Executive Officer ("CEO") Margaret d/o Vendagasalam ("PW4"). PW4 joined the plaintiff as an accountant in 1984. PW4 was appointed as the CEO of the plaintiff in 1994 and remained so until her resignation in 1999. PW4 testified that she had the full knowledge of the facts surrounding to the agreement. According to PW4 the defendant still owed the plaintiff the sum of RM3.3

which sum had been paid by the purchaser's solicitors to the defendant as stakeholders. PW4 further stated that as the CEO of the plaintiff she had never seen the purported joint-venture agreement as claimed by the defendant. Neither had PW4 been told of the payment of RM3.3 million by the purchaser through the defendant as stakeholders. PW4 stated that the defendant had all along given the impression to her that the balance sum had not been paid by the purchaser amounting to RM4 million. During PW4's tenure in the plaintiff and up to the time of her resignation the defendant had maintained the stand that the purchaser had never paid the balance sum of RM4 million to the defendant as stakeholders.

[34] According to PW4 even Dato' Mohamed Kamal bin Hussein the Managing Director of the plaintiff, was not aware that the monies had been paid to the plaintiff. When chairing the Board Meetings of Sateras, Dato' Kamal had informed the attendees of the said meetings that the balance sum had not been paid to the plaintiff (at p. 209 of "B2"). Due to this the plaintiff had instructed their then solicitors Messrs Murthy & Associates to demand the same from the purchaser. PW4 had also had a discussion with the said Ganesan to inquire the reason the said land was registered in the name of the purchaser despite the balance sum had not been paid (exh. P1 at p. 492 of "B3"). Pertaining to the claim by the defendant that there was a joint-venture agreement entered into by the plaintiff and the purchaser PW4 testified that if it was true it would surely be documented in the plaintiff's document and the plaintiff being a company would have to obtain the resolution from its board of directors to authorize the plaintiff to enter into any joint-venture project with the purchaser. In this case there was no resolution to that effect had been made by the board of directors of the plaintiff. Despite being the CEO of the plaintiff, PW4 had no clue as to whether there were negotiations on the terms and conditions of the joint-venture project between the plaintiff and the purchaser. PW4 was also unaware if the plaintiff had authorized the defendant to release the balance sum to the purchaser purportedly as the plaintiff's investment in the joint-venture-project.

[35] There were queries having been made by PW4 to the defendant but the defendant had not responded to these queries. Further pertaining to the defendant's allegations that there were conditions attached to the agreement PW4 confirmed that the

grant of easement was not a condition precedent as claimed by the defendant. PW4 reiterated that it was merely a covenant under the agreement.

Case For The Defendant

[36] Seven witnesses testified for the defendant. They were Ganesan s/o Karuppaanan the senior partner of the defendant ("DW1"), Dato' Mohamed Kamal bin Hussein, the Managing Director of the plaintiff and Sateras ("DW2"), Muralitharan s/o Rahman, Branch Manager of RHB Bank Taman Shamelin Branch, Kuala Lumpur ("DW3"), Said Mohd Jawahir bin Bahari Senior Manager of Bank Islam, Kuala Lumpur ("DW4"), Muhamad bin Ibrahim, General Manager of Properties Division of Sateras ("DW5"), Oii Chee Leong, the Managing Director of LK Oii Development Sdn Bhd ("DW6") and Nelson Chan Chow Yew, Branch Manager HLBB ("DW7").

[37] At the material time DW1 was a practicing lawyer and a Senior Partner of his previous firm known as Ganesan K & Rakan-Rakan. DW1 commenced his career in the legal profession in 1994 dealing with commercial litigation and conveyancing practice. DW1 testified that his previous firm Ganesan K & Rakan-Rakan had been the solicitors and counsel for Sateras of which the plaintiff was a wholly owned subsidiary since 1994. DW1 had been the plaintiff's counsel advising the plaintiff on corporate as well as other legal issues. DW1's main contact person in Sateras was DW2. The then firm of DW1 depended on Sateras, the plaintiff included, for income and almost 60% of DW1's firm's income came from Sateras and the plaintiff. Due to the long relationship DW1 had with the plaintiff the relationship between DW1 and DW2 was very close and special and the professional relationship then turned to be more personal between DW1 and DW2. Most of their business dealings would be *via* telephone calls, meetings and memos only, with no structured formal document. All corporate exercise involving Sateras were done through informal instructions which were acted upon by DW1 despite huge sum of monies were involved.

[38] The defendant was appointed by the plaintiff to act for them in the said agreement. The instruction to the defendant was given orally. Apart from the requirement to obtain the FIC approval as well as the consent to transfer the said land to the purchaser the Plaintiff was also required to obtain the approval of a layout plan

from "Institusi (Sekolah Swasta)" to "Kemajuan Akan Datang" (Perumahan) ("cl. 4.4 of the agreement at p. 7 of "B1""). Besides that the plaintiff was also required to obtain a right by way of an easement over an adjoining piece of land owned by the plaintiff for purposes of access.

[39] In July 1996 DW1's firm prepared Form 17A and obtained the signature of the plaintiff which happened to be the owner of the adjoining land for the granting the right of way. After obtaining the plaintiff's signature on 30 July 1996 the said Form 17A was sent to the purchaser for signing. The following day the purchaser informed DW1 that there was error on the said Form 17A. DW1 noted the comments and informed the purchaser that he would revert to the purchaser with the correct Form 17A as DW1 had to obtain the consent of Bank Islam Malaysia Berhad, the chargee of the adjoining land (at pp. 61 & 62 and pp. 59 & 60 of "B1"). In order to enable the purchaser's solicitors to release the 1st Tranche of payment amounting RM810,000, DW1 had caused a letter to be sent with an undertaking that they would forward the fully executed Form 17A by the vendor and the chargee together the original issue document of title ("at p. 64 of "B1").

[40] The defendant had on 21 October 1997 forwarded to the chargee of the adjoining land form 17A for their execution but the same was not returned. Pursuant to the agreement the purchaser was required to pay a deposit of RM900,000 which was 10% of the purchase price upon execution of the agreement. The deposit shall be paid upon receipt of the FIC approval and the consent to transfer. The 2nd Tranche shall be paid upon fulfillment of two conditions that is the approval of the amended layout plan and the grant of easement by Bank Islam Malaysia Berhad ("cl. 5.1 of the agreement at p. 7 of "B1""). On or about 17 March 1997 a sum of RM2,750,000 being the redemption sum was paid to the plaintiff by the purchaser's Financier UMFB. Around 24 March 1997 the said UMFB had through Messrs Azhar & Goh released the sum of RM4 million to the defendant. A sum of RM450,000 was retained by the said Messrs Azhar & Goh as retention Sum for purposes real property gains tax under the Real Property Gains Tax Act.

[41] The plaintiff had not fulfilled the two conditions under cls. 4.4 and 8.3 of the agreement. Notwithstanding that UMFB released the 2nd Tranche of RM7.2 million as the said land was subject to a charge to HLBB at the material time and the plaintiff

was constrained to redeem the land. Further the chargee, HLBB had threatened to foreclose the said land as the plaintiff had defaulted in its payment to the said chargee. The plaintiff could not afford to terminate the agreement though such term was provided for in the agreement as the plaintiff did not have RM1.8 million to refund to the purchaser.

[42] The plaintiff and the purchaser had agreed for UMFB to release the sum of RM7.2 million on condition that the balance sum of RM4 million to be held by the defendant as stakeholders. In the course of that both the defendant and the plaintiff had given undertakings to UMFB dated 12 March 1997 and 21 February 1997 respectively (at pp. 249-250 of "B2" and "exh. D5(b)"). Subsequent to that a sum of RM2,750,000 had been released to the chargee, HLBB on 17 March 1997.

[43] As the plaintiff was not able to satisfy the requirement under cls. 4.4 and 8.3 of the agreement the purchaser had agreed to release the said sum only if payment was made to the defendant as stakeholder subject to plaintiff's new undertaking ("at p. 254 of B2"). Upon receipt of the plaintiff's new undertaking Messrs Azhar & Goh had released the balance sum to the defendant as stakeholders. The defendant was directed by the plaintiff to release this sum to the purchaser.

[44] DW1 was also queried by DW2 as to the reason the redemption sum could not be released to the chargee and instructed DW1 to liaise with DW5 who was the General Manager of Sateras (Properties). When DW1 contacted DW5, DW1 was informed that there was a change of plan, in that, both the plaintiff and the purchaser had agreed to go into a joint venture agreement. DW1 was informed that the purchaser would redeem the land from the chargee and that DW5 would require the RM4 million to be released to the purchaser to enable the purchaser to service the interest due to HLBB. DW5 had told DW1 that the plaintiff would prefer the RM4 million to be returned to the purchaser and convert the agreement into a joint venture agreement on a 60:40 profit sharing basis.

[45] DW5 had later instructed DW1 to release the RM4 million to the purchaser. However DW1 was to hold on to the monies until further directions from DW5. After deducting the sum of RM150,000 as fees owed by the purchaser and LK Oii Group of Companies the balance sum of RM3,850,000 was placed in Kwong Yik Bank as fixed deposit *vide* cheque number 547584

(exh. D10, D10 (A) at p. 12 & 21 of "B6"). From this sum, a sum of RM1.8 million was released by DW1 to the purchaser at the purchaser's request on 28 August 1997 (at p. 15 of "B6"). On 17 June 1997 a sum of RM750,000 was released to the purchaser *vide* Kwong Yik Bank cheque number 537061 (exh. D14 at p. 22 of "B6"). The remaining sum was set off against the fees and disbursement owed by the purchaser and LK Oii Group of Companies to the defendant. DW1 could not produce the documents pertaining to these disbursements as the records had been destroyed and this was confirmed by the letter from the Bank to Polis Di Raja Malaysia (PDRM) (exh. D13). The purchaser had admitted receipt of this sum (pp. 522 - 532 of "B3").

[46] DW2 explained that the joint venture project did not materialize due to the 1997 economic crisis. DW2 then had instructed DW1 to request for the repayment of the said sum by the purchaser as the contemplated project could not be proceeded with. A portion of the RM3.3 amounting to RM700,000 was refunded to the plaintiff through the defendant in four installments of RM200,000 (cheque number 537143 at p. 21 of "B6" (exh. D7)), RM200,000 on 19 December 1997 (cheque number 537148 at p. 21 of "B6" (exh. D8), RM100,000 on 30 December 1997 (cheque number 646458 at p. 20 of "B6" (exh. D9)). A sum of RM200,000 (p. 253 of "B2") was paid by the purchaser directly to Sateras.

[47] Both the purchaser and the plaintiff had entered into a supplemental agreement dated 23 March 1999 to convert the balance RM3.3 million as debt owed by the purchaser to the plaintiff and this was approved by the board resolution dated 23 March 1999 (exh. D6 at p. 533 of "B3"). This supplemental agreement was confirmed by the purchaser and for the purpose of this supplemental agreement the purchaser's managing director (DW6) stood as guarantor. The purchaser had *vide* the supplemental agreement admitted owing the plaintiff the sum of RM3,288,000 plus an additional sum of RM450,000 with interests of 10%. The purchaser had also executed the transfer of securities (form 32A) of 39.5 % of its shares to the plaintiff as securities (see resolutions at pp. 534 - 535 of "B3" exh. D16 & p. 24 to 35 of "B6" exh. D17a - 1). This fact was further supported by the filing of the proof of debt by the plaintiff with the accountant's

of the purchaser (also see 255 - 257 of "B2", 85-86 of "B1", 254 of "B2", 414 of "B2"). The facts pertaining to the sum still owed by the purchaser were in full knowledge of the plaintiff (pp. 126, 145, 163, 176 of "B2").

[48] On the whole and in essence the evidence of DW2, DW5 and DW6 who were the managing director of the plaintiff and Sateras, the General Manager of Properties Division of Sateras and Oii Chee Leong ("DW6") of the purchaser respectively had corroborated the evidence of DW1 and confirmed the events surrounding the balance sum illustrated by DW1 in his testimony in court (see WS DW2, WS DW5 and WS DW6).

[49] DW3 was the RHB Bank Berhad Branch Manager who had joined the bank on 3 September 1984. DW3 informed the court that the then Ganesan K & Rakan-Rakan had maintained a current account number 0-12093-0-2013-4 in respect of its client's account with the bank. The said account was an ordinary current account which was opened on 17 March 1997. *Vide* a cheque number 569015 dated 29 April 1997 (exh. D11 at p. 22 of "B6") a sum of RM1,000,000 was written in favour of the purchaser. The payment to the purchaser was documented in the April monthly statement of Kwong Yik Bank Berhad (at p. 14 of "B6") and the document disclosed that the said sum had been debited from the defendant's client's account. Another sum of RM1.8 million was also debited from the same account *vide* cheque number 569039 (exh. D12 at p. 15 of "B6"). On 18 June 1997 a cheque Number 537061 for the sum of RM750,000.00 was also written in favour of the purchaser (p. 18 of "B2"). Pursuant to the deposit slips dated 15 December 1997, 9 December 1997 and another slip (the dates could not be ascertained (exh. D28 at p. 19 of "B6") a sum of RM200,000, RM100,000 and RM200,000 respectively had been deposited into the current account. Cheques number 537143 in the sum of RM200,000, cheque number 537148 for RM200,000 and cheque number 646458 from RM100,000 respectively had been written by the defendant in favour of Sateras (at pp. 20 & 21 of "B6").

[50] The defendant had on 15 December 2004 written to the said Kwong Yik Bank requesting for copies of the abovementioned cheques and was told that the bank had destroyed those cheques according to the bank's procedure (exh. D13).

[51] DW4, the Senior Manager of Bank Islam (Malaysia) Berhad ("Bank Islam") who was in charge of all non performing commercial and corporate loans of Bank Islam informed the court that he was in possession of the file pertaining to a piece of land owned by the plaintiff known as H.S. (D) 2052 PT 1393 Mukim Serendah Daerah Ulu Selangor (adjoining the land) which was charged to Bank Islam as a security of the loan granted to the plaintiff.

[52] Bank Islam had received a request from the plaintiff to execute Form 17A of the NLC to give the right of easement to the adjoining land also owned by the plaintiff. DW4 confirmed that he had received a letter from the defendant for him to confirm the execution of Form 17A and he had answered the defendant's letter dated 20 December 2004 informing the defendant that Bank Islam who was the chargee had not executed Form 17A which was sent to Bank Islam.

[53] DW7 who was the Branch Manager of HLBB at No 26, Lorong Rahim Kajai 14, Taman Tun Dr Ismail, 60000 Kuala Lumpur, testified that the Current Account Number 00400021823 belonging to the purchaser which was opened on 2 March 1994 had been closed and was no longer active (Q & A 9 of WSDW7).

Findings And Evaluation

Burden Of Proof

[54] The law on the burden of proof is governed by the provisions found in Chapter VII of Part III of the Evidence Act 1950 ("the Act"). Pursuant to s. 101 of the Act, the legal burden of establishing the facts pleaded against the defendant is on the plaintiff. At the conclusion of the case this court has a duty to determine whether sufficient evidence had been adduced by the plaintiff to prove its case on the balance of probabilities for the plaintiff to be entitled to the judgment prayed for in the SOC.

[55] Pursuant to s. 106 of the Evidence Act 1950 the burden to prove any facts which is especially within the knowledge of the plaintiff lies on the plaintiff.

[56] In *Johara Bi Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor* [1980] 1 LNS 199, His Lordship Chang Ming Tat FJ approved of the judicial approached of the High Court that until and unless a plaintiff has discharged the onus on it to prove its

case on a balance of probabilities the burden does not shift to the defendant and no matter if the defendant's case is completely unbelievable, the claim against him must be dismissed.

[57] With this principle in mind I would now evaluate the plaintiffs' and the defendant's evidence in order to ascertain if the plaintiff had met with the standard of proof envisaged by the law in respect of its claim against the defendant which was on the balance of probabilities.

[58] Before I delve into the issues and my findings in respect of the case before me, I wish to stress here that out of the plaintiff's four witnesses three of them came to the scene very much later and none of these three witnesses had personal knowledge pertaining to the agreement and or events that transpired surrounding the agreement. It was only PW4 who was the then chief officer of the plaintiff up to the year 1999 who had some background pertaining to the deal. Strangely and interestingly the ex managing director of the plaintiff and Sateras at the material time, one Dato' Mohamed Kamal bin Hussain (DW2) and Muhamad bin Ibrahim who was the General Manager (Properties Division) for Sateras at the material time (DW5) who were senior officers of the plaintiff (DW2) and Sateras (DW2 and DW5) opted to go to the witness box as witnesses for the defendant.

Issue 1

Whether The Plaintiff Had Complied With The Condition Under cl. 4 Of The Sale And Purchase Agreement Entered Into Between The Plaintiff And LK Oii Development Dated 31 March 1996? If The Answer Is In The Affirmative Whether The Plaintiff Is Entitled To RM3.3 Million Which Was Deposited By LK Oii With The Defendant As Stakeholders?

[59] At para. 10 of its SOC the plaintiff had pleaded that after the plaintiff had fulfilled all the preconditions which were stipulated in the agreement the defendant had caused a letter dated 12 March 1997 to be issued to the purchaser's solicitors wherein all the relevant documents were forwarded to enable the purchaser to redeem the land from HLBB. Further at para. 3 of the plaintiff's reply to the defence the plaintiff as the owner of the adjoining land had pleaded that it had executed Form 17A for purposes of the grant of the easement to the land. However none of the plaintiff's witness was able to prove to this court by way of documentary evidence that the said Form 17A was fully

executed and registered pursuant to the NLC. Neither could the plaintiff prove that it had obtained the approval of the amended lay out plan from "Institut Sekolah Swasta" to "Kemajuan Akan Datang (Perumahan)" which was a condition precedent to the release of the balance sum (cl. 4.4 of the agreement at p. 7 of "B1"). Despite being the plaintiff's executive officer at the material time PW4 was not able to recall if the amended layout plan was submitted to the Bahagian Perancang Bandar dan Desa Negeri Selangor for approval. No approval was tendered in court to prove that this precondition was satisfied.

[60] Pursuant to the defendant's letter dated 12 March 1997 (pp. 249 - 250 of "B2") the defendant had given the undertaking to the purchaser's solicitors that the defendant would not release the balance sum which the defendant was holding as stakeholders until the plaintiff had fulfilled the above two conditions mentioned which were the execution and registration of Form 17A for the grant of easement and the approval of the amended layout plan.

[61] The defendant's witnesses DW2 and DW5 who were senior officers of the plaintiff (DW2) and Sateras, (DW2 and DW5) and DW6 the director of the purchaser had testified and confirmed that at the material time the plaintiff had not obtained the necessary approval in respect of the amended layout plan which was a condition precedent (cl. 4.4 of the agreement) to the release of the balance sum. As such the plaintiff had not satisfied the precondition which would enable the defendant to release the balance sum to the plaintiff.

[62] As regards to the grant of easement (under the term "the performance of other condition" (cl. 5.1 of the agreement at p. 7 of "B1")) which was also a precondition to the release of the balance sum there was a letter issued by Bank Islam which was the chargee of the adjoining land which confirmed that Bank Islam had not executed any Form 17A under the NLC for the purpose of the grant of easement (p. 486 of "B2"). This was further confirmed by one Said Mohd Jawahir bin Said Bahari who was the senior manager of Bank Islam (DW4) and who subsequently became the manager of Bank Islam. DW4 testified that he was acquainted with the file in respect of a piece of land known as

H.S.(D) 2052 PT 1393 Mukim Serendah Daerah Ulu Selangor, Selangor which was opened in 1994. DW4 clarified that Bank Islam had not executed Form 17A under the NLC for purposes of the granting and registration of an easement in respect of the adjoining land. DW1 had also testified in examination in chief *via* WS DW1 that after obtaining the plaintiff's signature which happened to be the owner of the adjoining land, DW1 had received a reply from the purchaser's solicitors that there was an error in the said Form 17A (see pp. 61 & 62 and 59 & 60 of "B1"). On 18 October 1996 (at p. 8 of "B6") DW1 had forwarded four copies of Form 17A to Bank Islam for the said bank's further action but the same was not returned. DW1 had informed the plaintiff *via* his letter dated 19 February 1997 (p. 9 & 10 of "B6") pertaining to the status of Form 17A. The plaintiff through PW4 had responded to the said letter and given the assurance that PW4 would follow up with the said Bank Islam (p. 11 "B6" (exh. P4)). Both DW2 and DW5 confirmed that the plaintiff could not meet with the above two preconditions to enable the defendant to release the balance sum to the plaintiff.

[63] There was sufficient evidence before me both testimonial and documentary which showed that these two preconditions (cl. 4.4, 8.3 and 5 of the agreement) had not been met by the plaintiff to enable the defendant to release the balance sum to the plaintiff. None of the plaintiff's witnesses was able to challenge the testimony of DW1, DW2, DW4 and DW5 on this issue. Despite having pleaded that it had fulfilled these two preconditions in its SOC and also reply to the defence no evidence was adduced by the plaintiff to prove the registration of the easement in respect of the adjoining land and or the approval by Bahagian Perancang Bandar dan Desa Daerah Ulu Selangor, Selangor of the amended layout plan from "Institut Swasta" to "Kemajuan Akan Datang (Perumahan)" had been obtained by the plaintiff. It was the Plaintiff which had asserted this fact and pursuant to s. 102 of the Act the onus was on the plaintiff to establish this evidence to this court. Based on the foregoing I have no hesitation to rule that the plaintiff had failed to discharge the burden to prove to this court its pleaded case on their issue. Therefore Issue 1 must be answered in the negative.

Issues 2 And 3

Whether The Sum Of RM4 Million Which Was Held By The Defendant As Stakeholders Had Subsequently Been Released To LK Oii Development Sdn Bhd At The Request Of The Plaintiff As The Plaintiff's Investment In A Joint Venture Agreement Entered Into By The Plaintiff And The Said LK Oii Development Sdn Bhd; And

Whether The Plaintiff Can Maintain An Action For Monies Paid Pursuant To A Sale And Purchase Agreement Which Was Superseded By A Supplemental Agreement Dated 23 March 1999 Entered Into Between The Plaintiff And The Purchaser.

[64] The next issue for determination was whether the defendant had released the sum of RM4.0 million it received from the purchaser's solicitors Messrs Azhar & Goh to the purchaser. The plaintiff in its SOC and also reply to the defence pleaded that this sum had not been forwarded by the defendant to the plaintiff in full and up to the point this case was filed in this court the plaintiff maintained that it had only received the sum of RM700,000 on 16 December 1997, 19 December 1997, 30 December 1997 and 2 March 1998 respectively. A sum of RM493,802.71 plus interest of RM93,802 being monies withheld for the purpose of real property gains tax was also forwarded to the defendant less RM50,000 which was deducted by the defendant as their legal fees. The plaintiff alleged that the defendant still owed the plaintiff the sum of RM3.3 million from the balance sum they received from the purchaser's solicitors which the plaintiff was claiming from the defendant herein.

[65] DW2, the managing director of the plaintiff and its parent company Sateras had testified that at the material time the plaintiff was facing financial difficulty and was in no position to terminate the agreement with the purchaser as it did not have sufficient funds to refund the part payment of RM1.8 million paid by the purchaser. Further around the same time HLBB had threatened the plaintiff with foreclosure proceedings in respect of the Land due to the plaintiff's default in the repayment of its loans to HLBB. In addition to that there would also be liquidated damages imposed and this would cause substantial loss to the plaintiff and this would ultimately cause the said land to be auctioned by HLBB. On the other hand, the purchaser too was not prepared to agree to release the redemption sum by UMFB, its Financier as it was not prepared to be burdened with interest payment and wanted the plaintiff to bear the interest charges over the

redemption sum until such time the plaintiff was able to fulfill the condition precedents. Due to its financial constraint the management then was of the view that the best option for the plaintiff was to agree to enter into a joint venture project with the purchaser and treat the balance sum as the plaintiff's investment in the joint venture project. This was one way the plaintiff was able to save the land from being foreclosed by HLBB.

[66] DW2 had also agreed that the purchaser had paid the redemption sum of RM2.75 million and a sum of RM450,000 was retained by the purchaser's solicitors being payment towards Real Property Gains Tax. DW2 too confirmed that the purchaser had released the sum of RM4 million to the defendant which sum shall be held by the defendant as stakeholders. Both DW2 and DW5, the managing director of the plaintiff and the General Manager of Properties Division, of Sateras respectively confirmed that the parties to the agreement had agreed to enter into a joint venture project and that the sum of RM4 million released to the defendant as stakeholders was instructed by DW2 through DW5 to be returned to the purchaser as the plaintiff's investment in the contemplated joint venture agreement to be executed by both parties on a 60:40 basis. DW2 and DW5 too had testified to the critical financial crisis faced by the plaintiff at that material time and that was the only way to rescue the plaintiff and to save the Land from being foreclosed by HLBB. Towards this end DW2 had directed DW1 to liaise with DW5 and to report back the progress to DW2 from time to time. In order to carry out the instructions given by DW2, DW5 then instructed DW1 to release the balance sum to the purchaser as the plaintiff's portion of investment in the joint venture project to be undertaken by the Plaintiff and the Purchaser. DW1 testified that he had released the Balance Sum to the Purchaser after having verified the same with DW2 and this was done orally. DW1 then carried out the oral instruction he received from DW5 who was the Managing Director (Property) of Sateras. DW2 too had also confirmed that that he was aware that the plaintiff had given the undertaking dated 20 March 1997 to UMFB which were executed by DW2 and the company secretary one Mr Soong (at p. 254 of B2). DW2 was also aware of the undertaking given by DW1 to the purchaser's financier's solicitors (at pp. 249 to 250 B2).

[67] DW2 informed the court that around the later half of 1997 the plaintiff and the purchaser had to shelf their plans to undertake the joint venture project due to the global financial crisis which had severely hit the property market. DW1 confirmed that

they had wanted to carry out DW2's instruction to release the whole of the balance sum to the purchaser but was told to hold on until further instruction. From the balance sum a sum of RM150,000 was deducted as the purchaser's fees for other works done by the defendant to the purchaser leaving a sum of RM3.85 million which was placed in a fixed deposit under the defendant's client's account pending its release to the purchaser (exh. D10 and exh. 10A at pp. 12 and 21 of B6).

[68] The defendant had released the balance sum to the purchaser in the following manner:

Sum	Date	Mode of Payment
i. RM1million	29th April 1997	Kwong Yik Bank Cheque 569015
ii. RM1.8 million	28th May 1997	Kwong Yik Bank Cheque 569039
iii. RM750K	17th June 1997	Kwong Yik Bank Cheque 537061

(see exh. D11 at p. 22, exh. D12 at 15 of B6, exh. D14 at p. 22 and 18 of B6). According to DW1 the balance was set off against the fees and disbursement owed by the purchaser and LK Oii Group of Companies to the defendant)

[69] As the solicitors who had acted as stakeholders for the balance sum the defendant testified that it was a common norm for him to communicate and receive instructions from DW1 orally which had included the directions to restructure the debt of Sateras amounting to more than RM250 million. I had the evidence on oath of none other than DW2 himself who was the top most senior management of the plaintiff at the material time to confirm the existence of oral instruction to the defendant. This evidence too was corroborated by the next senior management of Sateras, the Managing Director of the Property Division (DW5). Despite being present in the witness box the learned counsels for the plaintiff didn't do much to shake the testimony of DW1, DW2 and DW5 in court. I have to accept the unchallenged evidence of DW1 which was corroborated by DW2 and DW5 who were the officers of the plaintiff from the old management and Sateras who were acquainted with the facts pertaining to the presence of oral instruction given to the defendant pertaining to the release of the balance sum. The decisions of DW2 and DW5 at the material time therefore bound the new management of plaintiff. In *Yue Sang*

A *Cheong Sdn Bhd v. PP* [1973] 1 LNS 182 the Federal Court held that "The person whose knowledge would be imputed to the company would be those who were entrusted with the exercise of the powers of the company".

B **[70]** The defendant was able to demonstrate to this court that the said balance sum was properly returned and or disbursed to the purchaser through the testimonies of their witnesses two of which were senior officer of the then plaintiff and Sateras. The testimony of DW1, DW2, DW5 and DW6 were supported by C contemporaneous documentary evidence tendered in court. The plaintiff however had not challenged the testimony of DW1, DW2, DW5 and DW6 or the documentary evidence tendered in court to prove that the balance sum had not been returned to the purchaser as instructed. The plaintiff had failed to establish their D pleaded case that the balance sum was still held by the defendant either through the testimonies of their witnesses and or through documentary evidence.

[71] DW1 had also testified that after the contemplated joint E venture agreement was aborted due to the global financial crisis which occurred towards the later part of 1997 the plaintiff had sought the purchaser to refund the sum of RM4 million which was the plaintiff's portion of the investment in the contemplated joint venture project. The purchaser had in fact made part payment in F the sum of RM700,000 to the plaintiff between December 1997 to February 1998 (at p. 253 of B2 and as in exh. D7, D8, D9). A sum of RM200,000 was paid by the purchaser to Sateras directly *vide* cheque no. 408607 (p. 253 of "B2"). These payments were made not by the purchaser's solicitors and or G UMFB as the plaintiff's financier but these three payments were in fact paid by the purchaser to the defendant and one payment was made directly to Sateras. The evidence also had shown that this sum was received by the plaintiff without any protest and or objection. The plaintiff admitted receipt of the sum of RM700,000 H from the purchaser, three payments were paid to the plaintiff by the defendant and the fourth payment was paid by the purchaser to Sateras directly. There was also no records as to why the balance sum was not paid in whole but in four installments. There was no evidence adduced by the plaintiff to query the defendant I and or the purchaser and or its financier as to why the balance sum was paid in that manner. Even DW6 the then managing director of the purchaser had also stated in evidence that the purchaser had made part payments totalling to RM700,000 to the

plaintiff. DW6 had also testified that DW2 had been closely following up on the repayment of the balance sum but due to the financial constraint faced by the purchaser at the material time it was impossible for the purchaser to repay the whole amount to the plaintiff and this had led to the execution of the supplemental agreement dated 23 March 1999. After the purchaser had been wound up the plaintiff had filed its proof of debt with Messrs Anuarul Azizan, Chew & Co. DW6 further confirmed that the plaintiff had filed an action against the purchaser and DW6 as the guarantor to recover the outstanding sum of RM3.3 after the purchaser had defaulted on the supplemental agreement. Judgment was obtained by the plaintiff against the purchaser (at pp. 85 and 86 of "B1").

[72] The minutes of the Sateras showed that the plaintiff was negotiating with the purchaser for the repayment of the plaintiff's investment. This was done as the plaintiff was fully aware that the balance sum received by the defendant had been returned to the purchaser. DW1's evidence pertaining to the release of the monies *via* exh. D7, D8, D9 and p. 253 of "B2" had not been challenged by the plaintiff's witnesses in court (also see exh. D13) and supported by the testimony of an independent witness (DW3) proved that the balance sum had in fact been returned to the purchaser as instructed. Based on the foregoing issues 2 and 3 must be answered in the affirmative and in the negative respectively.

Issue 4

Whether The Plaintiff's Action Is Barred By The Limitation Act 1953

[73] This matter arose as a result of the dispute between the defendant which acted as stakeholders in respect of the monies received pursuant to the Agreement and released back to the purchaser between 29 April 1997 and 17 June 1997. The plaintiff had also pleaded that the preconditions to entitle the defendant to release the balance sum to the plaintiff was pursuant to a letter issued by the defendant dated 12 March 1997 and the defendant was required to release RM4 million once they received the same which was on 24 March 1997 (para 11 - 13 of "A" at p. 57 of "A"). Based on the plaintiff's own pleaded case the plaintiff's cause of action against the defendant would have accrued on 24 March 1997 and given the provision of s. 6 of the Limitation Act 1953 the plaintiff ought to have commenced this action against the defendant within six years from 24 March 1997, which

was on 24 March 2003. The plaintiff's writ and SOC having been filed on 16 January 2004 was definitely out of time. On this score alone the plaintiff's claim ought to be dismissed by this court. Issue 4 would have to be answered with affirmative.

Issue 5

Whether The Plaintiff By Its Own Conduct, Action, Admission, Omission And Or From Contemporaneous Documents Is Estopped From Pursuing With This Claim

[74] In view of the facts surrounding this claim and the clear testimonies of the plaintiff's then managing director (DW2) and General Manager of Sateras Property Division (DW5) the plaintiff through their senior management had decided to instruct the defendant to return the balance sum to the purchaser all the decisions of the then management would definitely bind the plaintiff. The plaintiff's remedy, if any, would be against DW2 and or DW5 respectively. The plaintiff had also accepted the payment from the Purchaser as there was no objection or query made at the time of the receipt of the part payment. In fact as demonstrated earlier this fact was admitted by PW1, PW3 and PW4 as well as DW2, DW5 and DW6 respectively. The evidence of DW1 pertaining to the supplemental agreement (exh. D15 at pp. 522 - 532 of "B3") was corroborated by the plaintiff's then senior management DW2 and DW5 as well as DW6, the managing director of the purchaser. The plaintiff had in fact instructed the defendant to sue the purchaser in respect of the supplemental agreement and a judgment was obtained against the purchaser (p. 86 of "B1") and the lodgement of the proof of debt (at pp. 255 - 257 of "B2")with the liquidator. Based on the foregoing the plaintiff was estopped from claiming the said sum from the defendant.

Conclusion

[75] On the totality of evidence before me and on a balance of probabilities, I find, upon findings of fact both testimonial as well as documentary the plaintiff had failed to establish its claim against defendant. Hence the plaintiff's claim is hereby dismissed with costs.